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80-1249

NO._____

IN THE SUPREME COURT OF

THE UNITED STATES

JANUARY TERM, 1981

NINA DEFOURNEUX, Administratrix of the Estate of JEROME F. DEFOURNEAUX, JR., Petitioner, vs. STURM, RUGER & COMPANY, INC., a corporation, Respondent.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This diversity action is a bi-state product liability death case. The question presented for review is whether or not it is constitutionally permissible within the confines of the Erie and Klaxon doctrines of state conflict rules controlling non-federal matters for this Court to recognize a special federal common law when necessary to protect the constitutional rights of litigants or establish a uniform policy to guide federal courts in the determination of what is the state law of conflicts when a particular state's law is in a state of flux.

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IN THE SUPREME COURT OF

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JANUARY TERM, 1981

NINA DEFOURNEAUX, Administratrix of the Estate of JEROME F. DEFOURNEAUX, JR.,	)
Petitioner,	)
vs.	)
STURM, RUGER & COMPANY, INC., a corporation,	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justice of the Supreme Court of the United States:

Nina Defourneaux, Administratrix of the Estate of Jerome F. Defourneaux, Jr., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of The United States Court of Appeals for the

Second Circuit entered in the above-entitled cause on October 16, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is printed in Appendix A hereto, infra, page A-1. The Memorandum of Decision of the United States District Court, District of Connecticut, is printed in Appendix A hereto, infra, page A-5. The judgment of the United States District Court for the District of Connecticut is printed in Appendix A hereto, infra, page A-17.

JURISDICTION

The judgment of the United States Court of Appeals, Second Circuit, Appendix A, infra, page 1, was entered on October 16, 1980. The jurisdiction of the Supreme Court is invoked under U.S.C.A. Sec. 1254 (1).

QUESTIONS PRESENTED

The question presented for review is whether or not it is constitutionally permissible within the confines of the Erie doctrine and Klaxton concepts of state conflict rules controlling non-federal matters to recognize a special federal common law applicable to multi-state products liability death cases in light of the contervailing considerations protecting federal constitutional rights of litigants and in face of a strong trend in the forum state to adopt a modern conflicts-of-law approach?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first Section of the Fourteenth Amendment of the Constitution of the United States which is set out in Appendix B, page A-19, and Section 2 of Article IV of the United States Constitution, page A-20, of Appendix B.

This case involves Vernon's Missouri

Annotated 537.080. Action for wrongful death - who may sue, set out on page A-21 of Appendix B.

This case also involves Connecticut General Statutes, Sec. 52-555 set out on page A-23 of Appendix B.

STATEMENT OF THE CASE

This is a wrongful death action brought by the widow as administratrix of the estate for her deceased husband for herself and her child against the Respondent who caused the death by the design, manufacture, and sale of an unreasonably dangerous hand gun called a ".357 Magnum Ruger Blackhawk". The gun has no safety and can be discharged by accident if dropped a number of inches upon a hard surface. Numerous quantities of these hand guns were manufactured and shipped throughout the United States by the Respondent and one was purchased by the decedent, Jerome F. Defourneaux, Jr.. On November 13, 1976, the Petitioner's decedent, then 27 years of age, accidentally dropped the pistol, while hunting in Missouri: it discharged, killing him. Long before the death of Jerome F. Defourneaux, Jr., the Respondent

had full knowledge of this defect in its revolver which created an unreasonably dangerous condition known as a "drop fire". Despite this knowledge the Respondent continued to manufacture, distribute and sell this defective revolver throughout the United States, and has to this day, refused to recall the weapons or otherwise make them safe for consumers, many of whom have sustained serious injuries from these "drop fires" across the United States. The Petitioner filed her Complaint on November 8, 1978, who at that time was, but now is not, a Missouri resident, in the United States District Court for the District of Connecticut against Sturm, Ruger & Company, Inc., a Connecticut gun manufacturer. The Complaint if five counts alleged that the Sturm, Ruger hand gun was defective and unreasonably dangerous in that the unreasonably dangerous condition caused the death of Petitioner's decedent when it was

dropped. The Complaint sounded in negligence, strict liability, and breach of warranty. The Complaint was filed within the two year limitation period of Connecticut's Wrongful Death Statute, Con. Gen. Stat. Sec. 52-555, but not within the one year Missouri limitation for spouses and surviving children. Vernon's Mo. Stat. Ann. Sec. 537.080. The Respondent herein filed a Motion to Dismiss the Complaint claiming that the action was barred by Missouri's one year limitation for wrongful death actions. By a memorandum decision dated April 3, 1980, the District Court, Judge Burns, dismissed all counts of the Complaint and entered judgment on April 10, 1980, accordingly. Petitioner perfected an appeal to the United States District Court for the Second District where the case was heard on the transcript of the record and affirmed finding that a Connecticut court would apply the Missouri

statute of limitations under the facts of the case and found Petitioner's action to be time barred. The appellate court felt that the circumstances of the case did not justify a prediction that Connecticut would overrule its own state's conflict of law principles under a conflict of laws analysis since the case reflected significant contacts with Missouri and that state's policy to bar the widow's action after the one year period.

The District Court had jurisdiction of this case as a diversity action and the amount sued for in controversy is over $10,000.00 exclusive of costs. The Connecticut's Wrongful Death Act, Sec. 52-555, Con. Gen. Stat., has an undivided two year limitation statute.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to review the constitutional prohibitions against this Court's declaring a permissible federal conflict of law rule as a guide in selecting the correct choice of law principles of the forum state in a manner consistent with the forum state's trend of conflict-of-law. This is the first case of this sort before this Court. There is a dilemma of conflicting results in many federal court decisions when deciding the choice of law question in multi-state or bi-state products liability death cases in diversity actions. The district courts do not apply a uniform approach to decipher the signals being sent by the forum state or other state decisions when the task of prediction is encountered in multi-state products liability death cases. It is important that there be a federal policy to guide the federal courts

in such circumstances. There is a need for a uniform federal choice of law rule to govern products liability death cases in diversity actions. Certiorari should be granted to consider the question whether it is permissible for a special federal common law choice-of-law principle applicable to the resolution of this problem.

In the absence of a uniform federal choice of law policy federal courts may apply, as would the state in which they are sitting, unreasonable functional discrimination based on residency violative of the equal protection clause of the Fourteenth Amendment and Section 2 of Article IV of the United States Constitution. Due to the modern movement away from the rigid territorial concepts of choice-of-law which generally no longer control the conflict analysis and the movement toward a functional analysis, it is essential to re-examine Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020,

85 L. Ed. 1477, in terms of the constitutional permissibility under special federal common law principles to guide federal courts sitting in diversity cases when "predicting" what the state would do with the case being decided. Neither Erie R. R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82, L. Ed. 1188, nor Klaxon, supra, constitutionally prohibit the development nor application of special federal common law choice-of-law principles. The main evil sought to be remedied under the state of affairs spawned under Swift v. Tyson, 41 U. S. (16 Pet.) 1, 10 L. Ed. 865, that is, the fact that individuals in their every day life were subject to inconsistent bodies of law, has resurfaced under Erie and Klaxon due to the various divergent paths in the federal courts when the functional analysis is applied to the products liability death case multi-choice

conflict question. The problem is compounded by the constraints of a federalism which cannot employ its own creative federal contribution to the common law of conflicts, yet must carry out its duty of deciding questions of state law in diversity cases. Meredith v. Winterhaven, 320 U.S. 228, 237, 64 S. Ct. 7, 12, 88 L. Ed. 9, 15. The Second Circuit has often recognized its duty in this regard, Austin v. Williams, 198 F. 2d 697, 700 (2nd. Cir.) Certiorari Denied 344 U.S. 909, 73 S. Ct. 328, 97 L. Ed. 701, but like all federal courts, has never had a uniform or stable body of federal choice-of-law rules when confronted with prediction problems in non-federal products liability death cases.[1]

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[1]The courts looked in no uniform rules in federal tort claims cases either since in those cases the whole law, under Richards v. United States, 369 U.S. 1, includes the state's conflict rules. The death remedy, being a creature of state statute, has a built-in lack of uniformity in multi-state cases.

The federal circuit court below has employed nor has it been argued nor decided below that it is constitutionally permissible to employ specific uniform federal choice of law rules of construction to decide what the law of the state would be in a given case. The federal court's free choice of the state law data deemed important by it to resolve the issue leaves open the constitutional door for unintended, but no less harmful, arbitrariness subtly rooted in what are otherwise well-reasoned decisions. That is the problem confronted in the Defourneaux case. In affirming the reasoning of the district court's Memorandum of Decision, the Second Circuit has, on behalf of the State of Connecticut, held that Nina Defourneaux's Complaint is time-barred because she is not (or was not) a resident of Connecticut. This view may be criticized as to simplicity. Or it may be said to lack intellectual sophistication. But it is no less correct.

The district court states:

> "Perhaps if neither party had any meaningful relationship with the state whose law would govern under the old rule, Connecticut would apply the new approach. But here, the decedent and the plaintiff are both Missouri residents, and it is not offensive to traditional notions of justice or to normal expectations to apply Missouri law to adjudicate a claim of wrongful death when the death of a Missouri resident occurs in Missouri."

The essential point is, if the newer approach in conflicts would have been adopted by Connecticut in this case if its resident were killed or was a wrongful death beneficiary who brought this suit, but would deny the same approach on an equal basis to a non-resident in resolving the conflicts question, then grave constitutional questions arise in face of the equal protection clause of the Fourteenth Amendment. However, these questions of conflict law reverse discrimination can never come to light in the federal court, unless and until this Court

re-examines Klaxon and Erie to correctly state the permissible constitutional role of the federal courts and declare that there can be a special common law of choice of law principles to guide the federal courts in their role of prediction in diversity cases and state those principles.

II.

The meaning of the statement of Mr. Justice Brandeis in Erie, supra, that "there is no federal general common law" has been the subject of countless interpretations, expositions, reviews and comments in judicial decisions and legal literature. It is well-noted that Mr. Justice Bradeis applied what he called "federal common law" in another case decided the same day. Hinderlinder v. La. Plata River Ensign Cherry Creek Ditch Company, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202, 1212. Erie does not by its clear language exclude

the possibility of a federal special common law, especially as relates to choice of law. See Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 208 2n, 58 S. Ct. 860, 862, 82 L. Ed. 1290, 1293-94, Sub. Judice at time Erie was decided and which specifically reserved the applicability of Erie to choice of law rules.

A close reading of Klaxon does not preclude the existence of a body of special federal conflicts of law rules applicable in federal courts for the determination of the prevailing law in the forum state. Speaking of uniformity within a state as a goal of the Thompkins decision, Mr. Justice Reed, in Klaxon, went on to say:

> "Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such

> local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. (Citation) This Court's views are not the decisive factor in determining the applicable conflicts rule. (Citation) And the proper function of the Delaware Federal court is to ascertain what the state law is, not what it ought to be."

There are two rationales in the above language which clearly support the adoption of a special federal common law rule applicable in the instant case where the state law is not only ripe for adoption of a modern approach to conflicts but also where the district court below refused to employ its prophetic judgment as to what the high court of Connecticut would now do simply because of the residency of plaintiff and her decedent.

First, no prohibition is stated against

"special" as distinguised from "general" law as the Erie limitation. General common law conflicts rules are just that, "conflict of law" rules which, as independent rules state a local policy of decisional law governing the choice of law applicable to the disposition of a particular case. Klaxon prohibits this Court's view as to what the applicable general conflicts rule is, not special rules to guide federal courts in the quest to determine those general rules, especially when the task of saying precisely what the state law now is, (or would be as distinguished from what it ought to be) is in influenced by a rapid movement evidencing a strong trend in decisions towards change.

Secondly, no federal court is required under Klaxon to apply even an easily ascertainable general conflict of law rule prevailing in a state court which is not within the limits permitted by the constitution.

And to define those limits, it is subject to reveiw by this Court on any federal question that may arise.

It is Petitioner's contention that such federal questions are not required to travel in only the direction of the line of decisions premised upon an "affirmative countervailing consideration" of the federal system vs. state policy and practice in rejecting the determinative outcome considerations test and its progeny, Byrd v. v. Blue Ridge Rural Elec. Coop. Inc. U.S.C. 1958, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed. 2d 953, are exceptions to Erie to preserve the "outcome test", for example, Van Dusen v. Barrack, 376 U.S.C. 612, 84 S. Ct. 805, 11 L.Ed. 2d 945, but encompasses special rules referrable to a federal constitutional standard on a case by case basis as the federal question may arise to develop a body of special federal common law conflict rules in different types of cases.

III.

Under the facts and circumstances of this case before the Court, the decision of the district court as affirmed by the Second Circuit is discriminatory to the Petitioner denying her equal protection in violation of the Fourteenth Amendment. Petitioner urges that this Court hold as a part of the body of special federal conflict choice of law rules that in bi-state or multi-state products liability death cases and diversity actions, the federal court in making a prediction of state law and a selection of an applicable choice of law principle, may not consider the non-residency of the forum state of an interested party under any state standard to determine that an interest of a non-forum state is equal to or greater than the forum state's interest in applying its law if the result would be to deny the forum state's laws to

that party merely on the basis of his or her place of residency.

IV.

The law of the place where the gun discharged, the law of the place of probate of decedent's estate, and the law of the place of Petitioner's and decedent's residency allow for a one year statute of limitations for the compensation of the surviving spouse and children. The law of the place where the gun was manufactured and the law of the primary place of business of the gun company allow for a two year statute of limitations. The Plaintiff, Nina Defourneaux, and Plaintiff's decedent, Jerome Defourneaux, were residents of Missouri at the time the cause of action accrued, and the Defendant, Sturm, Ruger & Co., (SRC) is a corporation having its principal place of business then and now in the State of Connecticut. The purpose of limiting the period in which wrongful death cases may

be brought is to prevent the presentation of stale claims. The time period established in which to sue represents a legislative determination that a state's interest in protecting defendants from stale claims outweighs the unrestricted opportunity for the injured party to be compensated. Each state has a legitimate interest in both compensation of survivors of persons wrongfully killed and in the protection of defendants from stale claims. Missouri's Wrongful Death Act does allow for a claim during the second year after the wrongful death, but the claim is no longer available to the spouse and children, it going to the parents of the decedent. In general, the federal courts must attempt to determine what choice of law rules of Connecticut are to be used. The analytical inquiry must attempt to determine which, if either state, having a relationship to the parties

or the accidental shooting has the most significant interest in the application of its own substantive law to the merits of the statute of limitations issue. This is the principle of "depecage", the process of applying rules of the different states on the basis of the principle issue involved. The search in the instant case is not for the state whose law will be applied to govern all issues in the case. It requires the search for the rule which best control the specific issue involved with focus on the purpose and policies behind the decision to bar a plaintiff from suing for wrongful death for his or her spouse within one or two years thereof and protecting defendants from claims older than one or two years before liability attaches. The process of depecage analysis is found in aircraft product liability cases. Reyno v. Piper Aircraft Company, No. 79-2747 (3rd Cir. 1980), Petit. for Cert. filed, 49 U.S. L.Ed. 3429 (Dec. 9, 1980)

(No. 80-848) and In Re: Aircrash Disaster Near Chicago, Illinois on May 25, 1979, (7th Cir. 1981) No. 80-1812, No. 80-1813 and No. 80-1814. The threshold question then is what test of choice of law rule would Connecticut choose in this case? The Second Circuit, absent any special federal common law conflicts law rule as a guide, made a prefunctory treatment of the question and by informal opinion affirmed the "lex loci delecti" rule for Connnecticut primarily because as stated in the district court decision, the Plaintiff and her deceased husband were residents of the other state where the injury occurred. This was actually the very mechanical process of cranking various facts through a formula to add up to the contacts rejected in a depecage analysis.

If the federal special common law rule of conflicts urged by Petitioner on this

appeal were applied the Court of Appeals would have decided differently.

Without reviewing all the Connecticut cases and the federal cases deciding diversity questions which evidence the present poised position of the State of Connecticut to adopt a modern approach to conflicts, it is sufficient for purposes of this review to refer to the decision below as support for the State of Connecticut law, which heretofore, followed the old place of injury as the place of wrong rule but will soon adopt the position in the Restatement (Second) Sec. 175, Sec. 178, and Sec. 6(1971). ("The most significant relationship test"). Since a domiciliary consideration cannot be included in the weighing of the interests which determine the choice of law question in view of the constitutional implications if the result is not equal in its application to residents of the State of Connecticut and

the State of Missouri, the state policies behind Connecticut's statutory provisions must be considered. The protection of its defendant manufacturer from stale claims is the only interest of Connecticut that its statute of limitations in death cases promote in circumstances of this case. That protection found to be less in Missouri's death statute, Connecticut's protection of its gun manufacturers, would override any policy of the State of Missouri's statute with a lesser protection under a longer limitations period. Here, Missouri's is equal, that is two years, in which to file the claim, and only the party who may appropriate the action changes after the first year. Connecticut policy would not be affronted if a two year statute were made applicable to spouses, the same policy under Connecticut law would persist, that is the same protection from claims staler than two years of age. Missouri, on the

other hand, has an interest in protecting its manufacturers from stale claims and in the protection of out-of-state manufacturers doing business in the State of Missouri from stale claims more than two years old at the time commenced. However, the one year appropriation provisions of the Missouri statute, unique as it is, in no way are concerned with the preventing of stale claims against out-of-state manufacturers of guns since they may still be sued within two years under the Missouri Wrongful Death Statute, that is, the party plaintiff only changes.

Thus the consideration of the interest of both states to the prevention of stale claims against gun manufacturers is balanced and it cannot be said that Missouri or Connecticut has a greater interest in the decision.

The place of the discharge of the gun has a significant concern to Missouri since

it is strongly interested in preventing its citizens from being shot from defective guns and compensating the victim or survivor. However, Connecticut too would wish to see that victims or survivors shot by defective guns manufactured in its state would be properly compensated although there would not be the same state burden potential factor in the case of a non-resident like in the case of the State of Missouri. Compensation then of a survivor would also be fairly balanced, both states wishing to promote a remedy although Missouri's interest would be slightly greater than Connecticut's to see that compensation were provided. Here it is important to note, though, that Missouri's policy would not be frustrated if the spouse and child were compensated in a Connecticut court after a year since the spouse and the child are the most likely persons, the dependents of the decedent, as distinguished

from his parents, who may become a burden on the state if not compensated. The application of Connecticut's law actually promotes Missouri's interest to compensate the surviving spouse and children.

It cannot be said that Missouri's interest or Connecticut's interest should be accorded a greater weight under the circumstances.

The remaining state policy considerations relevant to the choice of law question are the principal place of business of the defendant, SRC, and the place of manufacture, shipment and introduction into the stream of commerce of the dangerously defective firearm. A unique consideration presents itself in firearms matters in Connecticut. Connecticut is a national center for the firearms industry. The fact that many of the largest and best known firearms makers are located in Connecticut certainly gives the state a strong

interest in setting minimum standards for that industry in products liability actions for both direct and punitive damages. Dunn & Bradstreet's, The Million Dollar Directory, 4360 (1979) list fourteen small arms manufacturing corporations with indicated net worth of more than one million dollars. Of those fourteen firms, six are headquartered in Connecticut. Other than California, with two firms, no state other than Connecticut, has more than one firm. Connecticut's policy interest in regulating its native firearms industry must supercede any interest of the place of an injury caused by a defect in a nationally distributed product such as the weapon here.

The defective weapon which killed Mr. Defourneaux was designed, manufactured, tested, advertised, and marketed in the State of Connecticut and was under the control of Connecticut. Notice to the defendant of the existence of the defect, if any, and

defendant's actions upon that knowledge of its products defect occurred in Connecticut. Warnings to the public or recall of the weapon involved, the duties neglected by the defendant, would necessarily have originated in Connecticut. Witnesses from the defendant's company and possibly other Connecticut firearms makers, will be required to testify regarding all of these aspects. Connecticut has a major firearms industry, of which the defendant is a part. In addition the policy interest of the State of Connecticut is as intense when the nerve center of the defendant corporation emanates from its principal place of business within the state. In this case, the nerve center for the entire firearms industry is in the State of Connecticut.

If the unique situation surrounding the State of Connecticut's control over the firearms industry and its intense interest in the control of that industry were not present

in this case, the above analysis would make it difficult to say that one's interest is greater than the other and the traditional resort to the place of injury would settle the question. However, the place of conduct and the place of business, both being in Connecticut, there is a strong interest in having its law applied to the question of whether there is compensation and the issue of punitive damages. Certainly compensation will have the effect of controlling the conduct of the manufacturer. To allow the manufacturer to escape completely offends both states' policies, but primarily, Connecticut's interests are affected. If compensation and punishment are assessed against the defendant, other corporations performing conduct in Connecticut will certainly be deterred from engaging in similar conduct. Thus there is a strong fit between the purpose of the policy allowing recovery under the Connecticut

Wrongful Death Statute and the facts of this case. Although there is the possibility that Connecticut could achieve its policies through use of criminal sanctions and legislation, the possibility, though relevant, is deemed not to be of great importance because as held in In Re: Air Crash Disaster Near Chicago, Illinois on May 25, 1979, on page 49, over reliance on such a factor would vitiate the "private attorney general" concept inherent in all actions for punitive damages and has a virtual presence in the awarding of even compensatory damages by the jury award system. Thus the combination of both the principal place of business and the place of alleged misconduct being in the State of Connecticut where there is an overriding policy consideration the most significant interest lies with the State of Connecticut.

Under the Connecticut Wrongful Death Statute, Con. Gen. Stat. Sec. 52-555, Nina Defourneaux's wrongful death suit is timely filed, having been filed within two years of the date of death, and her Complaint should be reinstituted below.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

RALPH T. STENGER
Attorney for Petitioner,
Nina Defourneaux, Admin.
of the Estate of
Jerome F. Defourneaux,
Jr., deceased

NO._____

IN THE SUPREME COURT OF

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JANUARY TERM, 1981

NINA DEFOURNEAUX, Administratrix of the Estate of JEROME F. DEFOURNEAUX, JR.,	)
Petitioner,	)
vs.	)
STURM RUGER & COMPANY, INC., a corporation,	)
Respondent.	)

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A TO PETITION FOR

WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of October, one thousand nine hundred and eighty.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE ELLSWORTH A. VAN GRAAFEILAND
Circuit Judge

HONORABLE JAMES S. HOLDEN*
District Judge

United States Court of
Appeals
Filed October 16, 1980
Second Circuit (stamp)

----------X

NINA DeFOURNEAUX, ADMINISTRATRIX OF THE ESTATE OF JEROME F. DeFOURNEAUX, JR.,

Plaintiff-Appellant

- against - 80-7384

STURM, RUGER & CO., INC.,

Defendant-Appellee.

----------X

Appeal from the United States District for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff Nina DeFourneaux appeals from an order of the United States District Court for the District of Connecticut, Ellen B. Burns, J., dismissing plaintiff's complaint. Plaintiff, a Missouri resident,

sought recovery for the wrongful death of her husband, also a Missouri resident, as the result of the accidental discharge, in Missouri, of a gun manufactured by defendant in Connecticut. Jurisdiction was based on diversity of citizenship. Judge Burns, concluding that a Connecticut court would apply the Missouri statute of limitations under the facts of this case, found plaintiff's action to be time-barred.

We agree with the analysis in Judge Burns's thoughtful opinion, which follows this court's prior holding in Patch v. Stanley Works (Stanley Chemical Co. Div.), 448 F. 2d 483, 491 (2d Cir. 1971). We recognize, as Judge Burns undoubtedly did, that this is a tragic situation, and that application of Missouri statute of limitations results in hardship to plaintiff. At the same time, however, we cannot lose sight of the responsibility of a federal court sitting in a diversity action to apply the

law as it finds that the forum state would. The circumstances of this case, involving as it does significant contacts with Missouri and a clearly defined Missouri policy reflected in its statutes, simply do not justify a prediction that a Connecticut court hearing this case would overrule that state's long-established conflict of law principles. See Gibson v. Fullin, 374 A. 2d 1061, 1064 (Conn. 1977).

Accordingly, we affirm the judgment of the district court.

S/WILFRED FEINBERG,
Chief Judge

S/ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge

S/JAMES S. HOLDEN,
District Judge

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*United States District Judge for the District of Vermont, sitting by designation.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NINA DEFOURNEAUX, Admin. for Estate of JEROME F. DEFOURNEAUX, JR. :

v. : CIVIL NO. B-78-437

STURM, RUGER & CO., INC. :

MEMORANDUM OF DECISION

This case involves a Connecticut defendant's allegedly negligent manufacture of a gun which accidentally discharged in Missouri and killed plaintiff's decedent, a twenty-seven-year old Missouri resident. Defendant has moved to dismiss the entire case on the basis that Missouri's one-year statute of limitation on wrongful death has passed.

Missouri's wrongful death statute, Vernon's Annot. Mo. Stat. Sec. 537.080(2), is unusual. It provides that claims for wrongful death vest in the decedent's spouse and minor children for a period of one year

from the date of death, if the decedent's parents survive him. After one year, the claim vests in the decedent's parents.

Plaintiff's counter the motion to dismiss with the contention that Connecticut law should apply to this case, and that the action would not be barred under Connecticut's two-year statute of limitation on wrongful death actions.

A federal court sitting in diversity applies the substantive law of the state where it sits, Erie R. R. v. Tompkins, 304 U.S. 64 (1938), including its choice-of-law rules, Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941). The question, then, is whether a Connecticut court would apply the law of Missouri to this case or whether it would allow its own law to govern.

In any conflicts of law issue, the first step is to characterize the problem, and characterization is done according to the law of the forum. Clearly under

Connecticut law, the wrongful death cause of action sounds in tort. After careful consideration of counsel's exceptionally helpful briefs and the cases cited therein, this court believes that a Connecticut court would apply Missouri law to this matter. In Patch v. Stanley Works (Stanley Chemical Co. Div.), 448 F. 2d 483, 491 (2d Cir. 1971), the Second Circuit stated, "For choice of law purposes under Connecticut law, a tort is committed not where the wrongful act or omission occurs, but where the injury is sustained." This court is, of course, bound by the decisions of the Second Circuit, and unless Connecticut law has changed since the Patch decision, Patch must control.

The most recent Connecticut case to discuss conflicts of law analysis is Gibson v. Fullin, 172 Conn. 407 (1977) where the court recognized that in other jurisdictions there has recently been some tendency to depart from the traditional "lex loci delecti"

rule in favor of the "most significant relationship" or "center of gravity" approach. However, the court went on to observe that "(u)nder this new approach, the developing rule is still very much in a transitional stage, and the present case presents no compelling reason to abandon the traditional rule." 172 Conn. at 411. From this language, it appears that the Connecticut Supreme Court would require a compelling reason to adopt the significant contracts approach. This court does not believe a compelling reason exists in this case. Perhaps if neither party had any meaningful relationship with the state whose law would govern under the old rule, Connecticut would apply the new approach. But here, the decedent and the plaintiff are both Missouri residents, and it is not offensive to traditional notions of justice or to normal expectations to apply Missouri law to adjudicate a claim of wrongful death when the death of a

Missouri resident occurs in Missouri.

Plaintiff has argued that to apply Missouri law (and thus bar the action) would be contrary to Connecticut's policy interest in regulating its firearms industry and the use of guns in general. A variation of this argument would be that this action has significant contacts with Connecticut based on Connecticut's interests in firearms regulation. Either approach might theoretically be used to support Connecticut's application of its own law. But Connecticut's interest in regulating the use and manufacture of firearms will not be frustrated by application of Missouri law. Under Missouri law, a cause of action exists to redress wrongs which result in death, and this cause of action presumably has the concomitant benefit of causing manufacturers of firearms to take steps to produce safe products. This court does not think that the fact that an action in Missouri can be instituted by the spouse

and surviving child during only one year, as opposed to two in Connecticut, is such a substantial difference as to cause a Connecticut court to prefer Connecticut law. The existence of the cause of action itself provides the deterrent effect which Connecticut favors.

Furthermore, Connecticut has no particular interest in how Missouri residents are compensated for their losses. Whatever the policy reasons for Missouri's unusual statute, Connecticut has an interest only in seeing that the opportunity for redress exists -- its absence would, of course, offend Connecticut's public policy and Connecticut might refuse to apply such a law. But any limit on the time within which an action may be initiated is based on considerations of fairness to potential litigants, certainty as to the potential for litigation, and prevention of stale claims, all of which are valid legislative concerns in every state.

Decisions on these issues will rarely result in the enactment of a law which another state would find offensive, and this court cannot say Connecticut would be offended here.

The court concludes, then, that the substantive law of Missouri, the place of the injury, applies to this case. Plaintiff next argues that Connecticut law must be used to determine which laws are substantive, and under Connecticut law the wrongful death statute of limitation is procedural. Since the statute of limitation is procedural, the argument continues, Connecticut's two-year statute should apply. This approach is incorrect. Once the decision is made that the Missouri wrongful death statute applies, all substantive parts of it apply. Connecticut law is looked to to determine what is substantive and what is procedural. Under Connecticut law, the Missouri wrongful death statute of limitations, being part

of a right of action which did not exist at common law, is a limitation of liability itself, and not just a limit on remedy. American Masons Supply Company v. F. W. Brown Co., 174 Conn. 725 (1978). Also, the Missouri statute is carefully constructed to limit the action in such a way that a Connecticut court would hold that the limitation was "so interwoven with the statute creating the cause of action that forms the basis of the suit that it is one of the congeries of elements necessary to establish the right, [and] the Connecticut court would apply the foreign statute of limitations that would apply at the situs of the injury." Mizell v. Welch, 245 F. Supp. 143, 144 (D. Conn. 1965), citing Thomas Iron Co. v. Ensign Bickford, 131 Conn. 665, 669 (1945).

Therefore, the court holds that Missouri's statute of limitation applies and that this action is time-barred under

Missouri law, Vernon's Annot. Mo. Stat., Sec. 537.080(2), in that the action was commenced more than one year after the date of death and at the time of the filing the cause of action no longer belonged to the plaintiff herein.

Plaintiff argues that even if the court finds as it has, the bar should apply only to Count One, the wrongful death count. The court does not agree. When the substantive law of a foreign jurisdiction controls a case, the forum court looks not just to the foreign statutes but also to how they have been construed by the courts of that state and how they would be construed if the matter being tried were tried in the foreign state. Gibson v. Fullin, 172 Conn. 407, 411 (1977); see generally Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956).

The statute in question here reads:

> Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, . . . the person who . . . would have been liable if death had not ensued shall be liable to an action for damages, . . . which damages may be sued for and recovered (1) by the spouse or minor children . . ., or (2) . . .if the spouse or minor children fail to sue within one year after such death, . . . then by the father and mother . . . [emphasis added].

Since no cause of action for wrongful death existed at common law, Kausch v. Bishop, 568 S.W. 2d 532, 534-35 (Mo. 1978), and since the Missouri Wrongful Death Act speaks in terms of "whenever . . . death . . . [is] caused by a wrongful act," this court is convinced that a Missouri court would not allow a tort cause of action for damages resulting from death to be brought by this plaintiff more than one year after the death, regardless of the tort theory employed. The probability that a Missouri court would reach this decision is enhanced by an examination of the Missouri court's discussion of a similarly worded

statute in State ex rel. Sisters of St. Mary v. Campbell, 511 S.W. 2d 141, 146-47 (Mo. Ct. App. 1974). There, the statute provided that "[a]ll actions against . . . hospitals . . . for damages for malpractice, error, or mistake shall be brought within two years from the date of the act of neglect complained of." Vernon's Mo. Stat. Ann. Sec. 516.140. The Missouri court said that, in its opinion, the general assembly determined in the above statute that all actions against hospitals for damages allegedly due to the above enumerated causes must be brought within two years regardless of whether the action is denominated a "tort" or "breach of contract." 511 S.W. 2d at 146.

Furthermore, in this instance plaintiff cannot escape the time bar contained in Section 537.080(2) by pleading in contract for another reason. Under Missouri law an action for wrongful death cannot be maintained upon a contract. Id. at 147.

Thus under Missouri substantive wrongful death law, all the causes of action contained in this complaint are time-barred and cannot be maintained. As this court understands the art of conflicts of laws analysis, that ends the inquiry.

The motion to dismiss is granted as to all counts.

SO ORDERED

S/ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated: April 3, 1980.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Filed April 10 1:38
P.M. 1980 Clerk
U.S. District Court
Bridgeport, Conn

NINA DEFOURNEAUX, Admin. For Estate of JEROME F. DEFOURNEAUX, JR.,	)	
v.	)	CIVIL NO. B-78-437
STURM, RUGER & CO., INC.	)	

JUDGMENT

This cause came on for consideration on the defendant's motion to dismiss by the Honorable Ellen Bree Burns, United States District Judge, and

The Court having considered the motion and all the papers submitted in connection therewith filed its Memorandum of Decision granting the defendant's motion,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the defendant and the complaint is dismissed.

Dated at Bridgeport, Connecticut

this 10th day of April, 1980.

SYLVESTER A. MARKOWSKI,
Clerk

By: S/ KEVIN F. ROWE
Deputy in Charge

APPENDIX B TO PETITION FOR

WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS

AND

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

STATUTES INVOLVED

Vernon's Missouri Statutes Annotated

537.080. Action for wrongful death--who may sue.

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, which damages may be sued for and recovered.

(1) By the spouse or minor children, natural or adopted, of the deceased, either jointly or severally; provided, that in any such action the petitioner shall

satisfy the court that he has diligently attempted to notify all parties having a cause of action under this subdivision; and provided, further, that only one action may be brought under this subdivision against any one defendant; or

(2) If there be no spouse or minor chilsren or if the spouse or minor children fail to sue within one year after such death, or if the deceased be a minor and unmarried, then by the father and mother, natural or adoptive, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or if the surviving parents are unable or decline or refuse to join in the suit, then either parent may bring and maintain the action in his or her name alone, for the use and benefit of both such parents; or

(3) If there be no husband, wife, minor child or minor children, natural born or adopted as herein indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent.

Connecticut General Statutes Sec. 52-555. Actions for injuries resulting in death. In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to

recover such damages and disbursements but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of.